Supreme Court, U.S.
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No. 92-1473

In The

Supreme Court of the United States

October Term, 1992

CLIFFORD LAUNIUS,

Petitioner,

vs.

THE BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF DES PLAINES, ILLINOIS; PAUL JUNG, Chairman, HERMAN HERZOG and WILLIAM J. CONNOLLY, Members of the Board of Fire and Police Commissioners; and JOSEPH KOZENCZAK, Chief of Police of the City of Des Plaines, Illinois,

Respondents.

On Petition for Writ of Certiorari to the Illinois Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Should this Court grant certiorari to consider the issues presented in the Petition even though the Petitioner failed to raise any federal question before the state court at any time prior to filing a petition for rehearing before the highest state court?

II. Are there "special and important reasons" for granting certiorari to determine whether it is constitutionally permissible for a board of fire and police commissioners to discharge a police officer who was guilty of eight different infractions?

III. Should this Court grant certiorari to determine whether, in order to satisfy the Constitution's equal protection guarantees, a board of fire and police commissioners must impose the same punishments on one police officer who was guilty of one infraction and another officer who was guilty of eight different infractions?

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OPINIONS BELOW

The Board of Fire and Police Commissioners of the City of Des Plaines, Illinois, ordered Launius' discharge on May 25, 1988, finding that Launius had committed numerous infractions warranting his dismissal from the police force. The Circuit Court

of Cook County, Illinois, Sophia H. Hall, J., affirmed the decision of the Board in an administrative review action on August 30, 1989, holding that the Board's decision was not against the manifest weight of the evidence.

The Illinois Appellate Court for the First District reversed the circuit court's decision in a 2-1 decision, remanding the case to the Board for consideration of a less severe penalty, after according different weight to the evidence before the Board. The Respondents filed a petition for leave to appeal to the Illinois Supreme Court, which was granted on October 2, 1991.

On September 24, 1992, the Illinois Supreme Court reversed the decision of the appellate court, finding that the appellate court had exceeded its role in the administrative review process by reweighing the evidence. Following the adverse decision, Launius filed a petition for rehearing before the Illinois Supreme Court, alleging for the first time that his federal constitutional rights had been violated. On November 30, 1992, the Illinois Supreme Court denied rehearing summarily, ordering the mandate to issue on December 10, 1992.

OBJECTIONS TO JURISDICTION

The Court should decline review because the Petitioner failed to raise the federal questions advanced in his Petition for Writ of Certiorari before the state courts.

STATEMENT OF THE CASE

This case involves the administrative review of a decision rendered by the Board of Fire and Police Commissioners[1] of the City of Des Plaines, Illinois, in a disciplinary proceeding. The

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1. Paul Jung succeeded the late A.W. Wilson as a member of the Board of Fire and Police Commissioners. He is named herein pursuant to Rule 35.3.

facts presented before the Board were essentially undisputed and are set forth in detail in the reported decisions below. The evidence adduced before the Board was that Officer Clifford Launius was assigned to work the second watch (7:00 a.m. to 3:00 p.m.) at the Des Plaines Police Department, on August 14, 1987. He was assigned desk duty, answering calls from citizens who were calling in for information and assistance relative to the flooding which was taking place throughout the City.

Shortly after beginning his shift, Launius exchanged a number of calls with his wife regarding a potential flooding problem in the basement at their home in Wheeling, Illinois, approximately eight miles from Des Plaines. Mrs. Launius called Launius at work to inform him that water was accumulating in the basement through seepage in the foundation. Launius informed his superior officer, Lieutenant Diehl, that he was in contact with his wife and that he might have to leave. Lieutenant Diehl denied Launius' request to leave his assigned post. Shortly thereafter, Launius again asked Lieutenant Diehl for permission to leave, and was again denied permission to do so. At approximately 10:10 a.m., Launius walked out of the desk area in derogation of Lieutenant Diehl's express directives to the contrary, and without securing a replacement for his position, and left the Des Plaines police station.

Lieutenant Diehl stated that, at the time Launius left, people were calling the police for help and that there were no squad cars available to answer calls. Further, electric power was failing in Des Plaines and alarms were going off throughout the City, but officers could not respond to the calls. Due to the lack of operational telephone facilities, officers on the street were directed to proceed to the homes of other police officers who lived in the City to tell them to come into the police station and report for duty.

Shortly after 11:00 a.m., Launius arrived home and discovered minimal damage. Instead of returning to the police

station. Launius began checking on his neighbors to see if he could assist them with their flooding problems. Launius spent the remainder of the morning and the afternoon hauling sand bags and stacking them around his townhome and those of his neighbors.

Launius had no contact with the Des Plaines Police Department until approximately 9:30 p.m. that evening when another officer called to inform him of the 12-hour shifts at the police station. Lieutenant Storm, the watch commander that evening, informed Launius that he was on emergency suspension with pay.

As a result of the storm, the City of Des Plaines received more than nine (9) inches of rain, experiencing the worst flooding in the history of the City. Former Illinois Governor, James Thompson, declared the county in which Des Plaines is located to be a disaster area. The flooding of August 14, 1987 affected approximately 7,000 homes and 200 businesses. Further, about 50% of the streets in the City of Des Plaines, including many of its major arterial and feeder streets, were totally blocked. The City's Emergency Traffic Plan went into effect sometime between 7:30 a.m. and 7:45 a.m.

Thirty-three Des Plaines police officers experienced flooding or water in their homes as a result of the rains. The only officer who left his post due to the flooding in his home was Launius. Numerous officers testified at the hearings that they sustained extensive damage and reported to duty, even though in some instances it required abandoning their damaged homes, spouses and children. Launius admitted that he realized that he acted improperly when he abandoned his duty station.

Another officer was also disciplined by Des Plaines Chief of Police, Joseph Kozenczak, as a result of events that transpired

during the flooding. Although not scheduled to work, Officer Richard Czyzewski was called by Sergeant Neil and told to report to duty. Officer Czyzewski swore at Sergeant Neil and explained that he was not coming in because his streets were impassable. Officer Czyzewski was suspended for four days for "insubordination".

The Chief of Police filed charges against Launius for his actions. The Board of Fire and Police Commissioners found Launius guilty of the charges of "unbecoming conduct"; "breach of performance of duty" in refusing to perform his duties as a police officer; "breach of duty responsibilities", because he failed to respond to his superior officer's orders denying him the request to go home; violating the rules regarding "relief", because Launius left his assigned post without being properly relieved; "absence from duty"; and "insubordination" for deliberately disobeying a lawful order of a superior.

As the penalty for these infractions, the Board dismissed Launius from the police force. Launius filed an action seeking administrative review of that decision, bringing into issue the limited question of whether the Board's ruling was against the manifest weight of the evidence. The Circuit Court of Cook County, Illinois, affirmed the decision of the Board discharging Launius. *See* App. C-1. On a 2-1 vote, the Appellate Court for the First District of Illinois reversed that decision, finding that the Board's ruling was not supported by what the appellate court determined to be the manifest weight of the evidence and the case was remanded to the Board for consideration of a less onerous penalty. *See* App. D-1. The Board filed a petition for leave to appeal to the Illinois Supreme Court, which was allowed on October 2, 1991.

On September 24, 1992, the Illinois Supreme Court reversed the decision of the appellate court, holding that the appellate court

exceeded its authority in an administrative action by reweighing the evidence before the Board. *See* App. A-1. The Illinois Supreme Court further ruled that the Board's factual finding that Launius abandoned his post during an emergency was not contrary to the manifest weight of the evidence, and that Launius' discharge was not arbitrary or unreasonable.

Launius subsequently filed a petition for rehearing in the Illinois Supreme Court, alleging for the first time that certain rights afforded him by the Declaration of Independence, the Fifth Amendment, and the Fourteenth Amendment, were violated by the Illinois Supreme Court in rendering its opinion. *See* App. E-1. The Illinois Supreme Court summarily denied the petition for rehearing on November 30, 1992. *See* App. B-1.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD DECLINE TO CONSIDER THE QUESTIONS ADVANCED BY LAUNIUS BECAUSE THEY WERE RAISED FOR THE FIRST TIME FOLLOWING FINAL JUDGMENT OF THE ILLINOIS SUPREME COURT.

Launius attempts to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a) (1992). However, numerous cases have held that this Court has no jurisdiction to exercise its appellate power over state court judgments, under section 1257 or its predecessor sections, unless a federal question has been raised in the state court below, or considered and resolved by the state court. *See, e.g., McGoldrick v. Compagnie Generale,* 309 U.S. 430, 434 (1940); *Hill v. California,* 401 U.S. 797, 805 (1971). Because Launius failed to timely present any federal questions before any state court, the courts did not consider or resolve any federal questions.

Consequently, this Court should decline to exercise jurisdiction to consider the purported federal questions which were manufactured by Launius for the first time after the ruling of the Illinois Supreme Court from which appeal is sought.

Specifically, section 1257 requires that the validity of a federal right or privilege be "drawn into question" or "specially set up or claimed." 28 U.S.C. § 1257(a) (1992). The proper manner of raising a federal question depends on the particular state practice. *See Central Union Telephone Co. v. City of Edwardsville,* 269 U.S. 190, 194-95 (1925); *Pennsylvania R. Co. v. Illinois Brick Co.,* 297 U.S. 447, 462-63 (1936), *reh'g denied,* 297 U.S. 728 (1936); *Parker v. Illinois,* 333 U.S. 571, 574-75 (1948), *reh'g denied,* 334 U.S. 813, *pet. denied,* 335 U.S. 856 (1947); *Michel v. Louisiana,* 350 U.S. 91, 93 (1955), *reh'g denied,* 350 U.S. 955. As Justice Harlan stated in his dissent in *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308, 334 (1968), in determining whether a question was "specially set up or claimed" within the meaning of a predecessor of section 1257(a), "it is relevant and usually sufficient to ask whether petitioners satisfied the state rules governing the presentation of issues." 391 U.S. 308, 334 (1968) (Harlan, J., dissenting).

It is insufficient to raise a federal question for the first time in a petition for rehearing directed to the highest state court. *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958), *reh'g denied,* 358 U.S. 858 (1957); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935), *reh'g denied,* 296 U.S. 661 (1934); *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932); *Forbes v. State Council of Virginia,* 216 U.S. 396 (1910); *Simmerman v. Nebraska,* 116 U.S. 54 (1885). In such a circumstance, a judgment will only be considered reviewable in the limited instances when the order denying rehearing goes beyond a cursory recitation and indicates that the federal question was considered and decided. *See Consolidated Turnpike Co. v.*

Norfolk and O.V.R. Co., 228 U.S. 326, 333-34 (1913), *reh'g denied*, 228 U.S. 596 (1913); *Forbes v. State Council of Virginia*, 216 U.S. 396, 399 (1910); *McCorquodale v. Texas*, 211 U.S. 432, 436-37 (1908).

The important policy considerations behind this jurisdictional requirement have long been recognized, initially in interpretations rendered regarding section 25 of the Judiciary Act of 1789, the linear ancestor of section 1257. *See* cases discussed by Justice Story in *Crowell v. Randell*, 10 Pet. 368, 391-98 (1836). Some of these policy considerations were succinctly summarized in *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) as follows:

1. If a federal question was not raised before the state court, the "record is very likely to be inadequate, since it certainly was not compiled with those questions in mind";

2. In a federal system, "it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves their constitutionality"; and

3. If properly raised below, the federal question might "be blocked" by the state court on an adequate and independent state ground, thereby rendering unnecessary any Supreme Court review of the federal issue.

See also, Illinois v. Gates, 462 U.S. 213, 218-20 (1983), *reh'g denied*, 463 U.S. 1237 (1983).

These policies are consistent with this Court's repeated acknowledgments that the state courts are competent to adjudiciate

federal constitutional claims. *See, e.g., Allen v. McCurry,* 449 U.S. 90, 105 (1980).

In the case *sub judice,* Launius' arguments before the circuit court, appellate court, and supreme court consistently advocated and defended the following positions:

1. The Board's findings were against the manifest weight of the evidence;

2. Launius did not receive a fair and impartial hearing;

3. The punishment imposed by the Board was arbitrary, and capricious; and

4. The Board was not uniform in disciplining officers guilty of different infractions.

The issues surrounding these allegations were fully briefed by all parties, and several amici, and were addressed by all three divisions of the state's judiciary. After receiving an adverse ruling from the Illinois Supreme Court, Launius filed a petition for rehearing alleging, for the first time, that his federal constitutional guarantees had been violated.

In an attempt to fashion an argument sufficiently attractive to draw this Court's attention, Launius' petition for rehearing averred that the Illinois Supreme Court's "decision constitutes a denial of due process in violation of the Fifth and Fourteenth Amendments of the United States Constitution," that the court "improperly applie[d] [a] duress principle resulting in a denial of the due process clause;" and that "the court's decision denies equal protection under the Fifth and Fourteenth Amendments." Because the Illinois Supreme Court's ruling affirmed the actions of the Board and the ruling of the circuit court, it was not unexpected or

surprising. If the mere rendering of an opinion by the state's highest court violates federal constitutional guarantees, every litigant, like Launius, who fails to raise a federal question prior to a highest state court's ruling on the merits will be afforded the opportunity to avail themselves to potential relief from this Court after an adverse ruling by the state's highest tribunal.

If, contrary to the language of his petition for rehearing, Launius' true complaint in his petition for rehearing is that the Illinois Supreme Court failed to consider certain federal constitutional guarantees that were allegedly violated by the action of the Board of Fire and Police Commissioners, the blame falls squarely upon Launius for failing to bring these issues before the court for consideration. As one commentator admonishes:

> [I]f you are about to commence litigation [in state court] in which there may be involved, then or ultimately, a question arising under the constitution or laws of the United States, you must raise the federal question at the outset and not as an after thought after you have lost below. By that time you are almost always too late * * * unless you build the record in your state litigation so that you *do* make a federal case out of it, you not only do not have a rosy chance of review, you do not have any chance of it at all.

F. Wiener, *Wanna Make a Federal Case Out Of It?* 48 A.B.A.J. 57, 60, 62 (1962) (italicization original.)

The record that the Court is being asked to consider is wholly devoid of any references to federal constitutional issues. It is clear from a review of the trial, appellate, and supreme court opinions that no federal questions were posed, nor were any considered or

decided by any state court. Now, five years after the Board's actions purportedly giving rise to a federal question, Launius alleges the existence of federal constitutional issues for the first time. Because Launius failed to advocate this issue at any previous stage, the Court should decline to consider his new claims and deny certiorari.

II.

THE PETITIONER HAS PRESENTED NO "SPECIAL" OR "IMPORTANT" REASON FOR THIS COURT TO REVIEW THE ILLINOIS SUPREME COURT'S DECISION.

Supreme Court Rule 10 establishes that a review on a writ of certiorari is not a matter of right, but a matter of judicial discretion. Rule 10 provides that "a writ of certiorari will be granted only when there are special and important reasons therefor." Because the Petitioner seeks the review of a state supreme court decision, this Court must consider whether the Illinois Supreme Court has, in the case *sub judice*, decided a federal question in a manner conflicting with a decision of another state court of last resort or of a United States court of appeals, or whether the Illinois Supreme Court's decision in this case involves an important question of federal law which should be settled by this Court, or which was decided in a manner conflicting with other applicable decisions of this Court.

The Illinois Supreme Court's decision in this case in not in conflict with a decision of another state court of last resort, a decision of a United States court of appeals, or a decision of this Court, nor does it involve an important question of federal law. Launius does not allege that it does. *See* Petition for Writ of Certiorari, generally. To the extent that the issues at bar involve due process or equal protection guarantees, the requirements of the due process and equal protection clauses have been well settled by this

Court and the decision of the Illinois Supreme Court is in accord with those requirements. Further, because the Illinois courts were not presented with any purported federal questions, such issues were not addressed by either the state court litigants, amici, or the courts.

In addition, it is significant to note that Launius does not even allege that "special" or "important" reasons exist that would warrant review by this Court. In his first argument in his Petition, Launius' argument centers around an allegation that the Illinois Supreme Court's decision was interpreted "as standing for the proposition that one's duty to government is more paramount than one's duty to family" by a local newspaper. *See* Petition for Writ of Certiorari at p. 11. "Duty to government" was never an issue before any of the lower courts. Instead, the narrow inquiry considered by the reviewing court was limited to whether the original administrative ruling was supported by the manifest weight of the evidence. Further, Launius' argument that "the Illinois Supreme Court has circumvented natural law", (*see* Petition for Writ of Certiorari at p. 17), while unique, is not supported by the record, which was determined in accordance with the well settled principles of administrative review law. Because Launius has failed to identify any special or important reasons for this Court to grant certiorari, the Court should decline to do so.

III.

THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THAT OFFICERS GUILTY OF DIFFERENT OFFENSES MUST RECEIVE EQUAL DISCIPLINE.

For his second argument urging this Court to grant certiorari, Launius contends that his equal protection rights were violated because he received a different sanction as a result of his eight different infractions than another officer received for one

infraction. *See* Petition for Writ of Certiorari, p. 18. In determining whether a complainant has been denied "due process of law" and the "equal protection of laws" by an administrative body such as the Board, the appropriate inquiry is whether the administrative tribunal acted contrary to the applicable statutes and rules and with arbitrary discrimination. *See Howard Sports Daily v. Weller*, 18 A.2d 210, 179 Md. 355 (1941). The discretion conferred upon an administrative body must be exercised on a reasonable or rational basis, and must not be used in a discriminatory manner to survive a challenge that its actions were arbitrary. *See Hennessey v. Independent School Dist. No. 4, Lincoln County, Okl.*, 552 P.2d 1141 (1976).

While Launius did not raise an equal protection issue before the lower courts, the courts did consider whether the Board's actions were arbitrary and unreasonable because the issue of the Board's action was raised before the state courts in a different context. The Illinois Supreme Court noted that, "An administrative tribunal's finding of "cause" for discharge may be considered arbitrary and unreasonable when it is compared to the discipline imposed in a completely related case," citing *Wilson v. Board of Fire and Police Commissioners,* 205 Ill. App. 3d 984, 992, 563 N.E. 2d 941 (1990). The court also recognized that "cause for discharge can be found regardless of whether other employees have been disciplined differently", citing *Lyles v. Department of Transportation,* 183 Ill. App. 3d 901, 911-12, 539 N.E. 2d 833 (1989), *appeal denied,* 127 Ill. 2d 619 (1989), a case in which the court did not find the discharge of an employee to be arbitrary where facts surrounding the charges of other employees precluded a meaningful comparison to the discharge at issue.

Launius maintains that he should have received a penalty similar to the four-day suspension received by an officer who, in a profane manner, disobeyed an order to report for duty. The Illinois Supreme Court, in its analysis, details the litany of misdeeds committed by Launius, concluding that:

> A police officer does not have the option of performing his duties when he wishes. [Launius] admitted that as a police officer, it was his primary and sworn duty to protect the lives and property of the citizens of Des Plaines. The board found, *inter alia*, that [Launius] abandoned his post, that he "refused to perform his duties as a police officer," that he "demonstrated a substantial shortcoming which render[ed] continuance in employment in some way detrimental to the discipline and efficiency of the Police Department"; and consequently, the board ordered that [Launius] be discharged from his position as a police officer. This decision was neither unrelated to the needs of the service nor arbitrary and unreasonable.

Launius v. Board of Fire and Police Commissioners of the City of Des Plaines, 151 Ill. 2d 419, 603 N.E. 2d 477 (1992), *reh'g denied*, __ Ill. 2d __ (1993).

Because the Board possessed the discretion to impose different punishments for the varying infractions committed by the two officers, it imposed a stricter penalty against the officer who was guilty of eight infractions. This was well within the Board's discretion and consistent with the equal protection guarantees conferred by the Constitution. Accordingly, there is no equal protection issue at bar which would require review by this Court.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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